Supreme Court of the United States

OCTOBER TERM, 1925.

No. 513

UNITED STATES OF AMERICA, *ex rel.* W. V. HUGHES,
Appellant,

vs.

ROY B. GAULT, United States Marshal,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT.

The judgment appealed from was entered April 29, 1925, by the Honorable Martin J. Wade, sitting in the District Court for the Southern District of Iowa. It discharged a writ of habeas corpus theretofore issued on the appellant's petition, and remanded the appellant to the custody of the appellee (R. 75). The opinion of the Court is not reported but is included in the Record (R. 73-75).

The petition for the writ of habeas corpus alleged that the appellant was detained under color of an order of commitment made by a United States Commissioner in a pro-

ceeding for the appellant's removal from the Southern District of Iowa to the Northern District of Ohio, for trial upon an indictment returned in the latter district which purported to charge a violation of the Sherman Anti Trust Act; that said order was void and violated appellant's constitutional rights because (1) the indictment, which was the only evidence introduced by the Government to show probable cause to believe appellant guilty of an offense, was insufficient for that purpose (R. 3); (2) even if the indictment was sufficient to make a *prima facie* case of probable cause, this case was overcome by evidence on behalf of the appellant, which demonstrated his innocence (R. 4); (3) the Commissioner held that probable cause had been shown after arbitrarily excluding evidence offered on behalf of appellant tending to show lack of probable cause, (R. 4-5).

The evidence before the Commissioner and his rulings excluding evidence are shown by his return to a writ of certiorari issued in aid of the petition for habeas corpus (R. 17-72). For his rulings excluding evidence, see R. 44-46, 50, 54-55, 57-58, 71.

Upon the hearing on the return of the marshal to the writ of habeas corpus, and the return of the Commissioner to the writ of certiorari, the District Court ruled that the indictment and proof of appellant's identity made a complete case for removal regardless of the evidence received by the Commissioner on behalf of appellant. The court therefore refused to consider either the evidence introduced before the Commissioner on behalf of appellant or the rulings of the Commissioner excluding evidence offered on appellant's behalf (R. 73-75).

The ruling relied on by appellant as the basis of this court's jurisdiction is the ruling of the District Court hold-

ing that the indictment and proof of appellant's identity was conclusive of the right of the Government to an order of removal, and its refusal to consider the evidence introduced before the Commissioner on behalf of appellant, and to hold that upon this evidence the Commissioner had no power or authority to commit the appellant, and that the order of commitment violated the appellant's rights under the Constitution of the United States.

The statutory provision upon which the appellant predicates the jurisdiction of this court is Section 238 of the Judicial Code as it existed prior to May 13, 1925, the effective date of the act entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court and for other purposes," approved February 13, 1925, and particularly the provision of that section authorizing a direct appeal from a district court of the United States to the Supreme Court in any case "that involves the construction or application of the Constitution of the United States." 5 Fed. Stat. Ann. (2nd ed.) 794.

The appellant relies upon *Tinsley* v. *Treat,* 205 U. S. 20, as showing that the case at bar involves the construction or application of the Constitution of the United States.

Statement of Case.

This is an appeal from an order of the District Court of the United States for the Southern District of Iowa, entered April 29, 1925, by the Honorable Martin J. Wade, District Judge, discharging a writ of habeas corpus sued out by appellant, and remanding him to the custody of appellee (R. 75) to be held under the terms of an order entered by a United States Commissioner committing appellant

pending an application to the District Court for appellant's removal to the Northern District of Ohio. (R. 73).

The petition for the writ of habeas corpus (R. 1-5) alleged that the appellant was detained by the appellee under an order of commitment entered by a United States Commissioner in a proceeding for the removal of the appellant to the Northern District of Ohio, Eastern Division, for trial under an indictment returned in the District Court for that district in which the appellant was named as a defendant. The proceeding was instituted by the filing of a complaint purporting to charge the appellant with a violation of the Sherman Anti-Trust Act. This complaint referred to and was accompanied by a certified copy of an indictment returned March 27, 1924, in the District Court for the Northern District of Ohio, Eastern Division, purporting to charge the appellant, together with forty-eight other natural persons and forty-six corporations, with having engaged in an unlawful combination in restraint of interstate trade and commerce in malleable iron castings. Copies of the complaint and indictment were attached to the petition as Exhibits B and C respectively (R. 2, 6, 8).

The petition charged that in the proceedings before the Commissioner there was no competent evidence to justify an order of removal and also that the Commissioner had violated the appellant's right to a hearing on the question of probable cause by excluding material evidence tending to show want of probable cause. In addition to the prayer for the writ of habeas corpus the petition prayed for a writ of certiorari directed to the Commissioner requiring him to certify the proceedings before him to the court (R. 5).

Both of these writs issued (R. 15-16) and the Commissioner made return to the writ of certiorari by filing a

stenographic transcript of the proceedings and evidence before him (R. 16-72).

From this transcript it appears that the Government rested its case after introducing a certified copy of the indictment in evidence and procuring an admission that the appellant was the W. V. Hughes named in the indictment, and that thereupon counsel for appellant moved the dismissal of the complaint on the ground that probable cause had not been shown (R. 17).

The indictment, which constituted the Government's proof of probable cause, consists of one count only. It alleges that the corporations made defendants were, during a period commencing January 1, 1917, and ending March 27, 1924, the date of the return of the indictment, engaged in interstate commerce in malleable iron castings, and were producing about 500,000 tons of such castings per year or approximately 75 per cent of the total production in the United States (R. 8-12), and that all of said corporations were members of a voluntary trade association with headquarters at Cleveland, Ohio, known as the American Malleable Castings Association, through and by means of which the unlawful combination hereinafter more fully described has been largely carried out" (R. 14).

As to appellant and the other natural persons named as defendants (except one Robert E. Belt who is alleged to have been the secretary of the association) the indictment alleges (R. 12) that the defendant corporations

> "throughout the said period of time respectively have had divers officers and agents who have been actively engaged in the management, direction and control of their affairs and business and of their said interstate trade and commerce, and that a list of the

> names of such officers and agents, so far as they are known to said grand jurors (Christian names unknown to said grand jurors being indicated by initial letters), showing with which of said corporations they have been affiliated during said period of time, is as follows, to wit:"

and there follows a list in which the name of appellant appears as having been affiliated with the Iowa Malleable Iron Company (R. 13).

There is no allegation in the indictment defining the connection of the appellant with this company save the statement that he was "affiliated" with it as one of its "divers officers and agents," nor is there any allegation, either in the inducement or in the charging part of the indictment, of any act performed or any order given by the appellant, either in his capacity as a corporate officer or agent or in any other capacity.

The charging part of the indictment consists of the fourth, fifth and sixth paragraphs. In the fourth paragraph (R. 14) it is alleged, by way of introduction and substantially in the language of the Sherman Act, that in the Northern District of Ohio all the defendants unlawfully engaged in a combination in restraint of interstate trade and commerce in malleable iron castings, "that is to say, in a combination now here described in restraint of, and which throughout said period of time, has unlawfully restrained said trade and commerce, in the manner hereinafter set forth."

The fifth paragraph (R. 14) then proceeds to describe the alleged combination as follows:

> "Throughout said period of time said corporate defendants, under said management, direction and

control of their said officers and agents, namely, the said individual defendants, and with such participation of said association and of said Robert E. Belt, its secretary, have carried on the said interstate trade and commerce of said corporate defendants in malleable iron castings in accordance with and pursuant to an understanding and agreement between said corporations to eliminate competition among themselves, as to prices, terms and conditions of sale, and as to customers; and, by agreement, have from time to time fixed excessive and noncompetitive prices to be charged by all of them for said castings, and have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to be held as exclusive customers, and have enforced such assignments by refraining directly or indirectly from competing for customers so assigned."

The sixth paragraph (R. 14) alleges that

"As a means of securing compliance on the part of each of said corporate defendants with the terms of said agreements, said corporate defendants, throughout said period of time, have been members of and have maintained an organization known as the American Malleable Castings Association, with headquarters at Cleveland, Ohio, and have required said Association, among other things, to collect and receive from each of its members information as to the details of such member's business, and to distribute such information among all the members for their use in avoiding and preventing breaches of said agreements."

The seventh and final paragraph (R. 15) consists only of the formal allegation that the defendants "in the man-

ner and form aforesaid unlawfully have engaged in a combination in restraint of trade and commerce among the several states in malleable iron castings, against the peace and dignity of the United States," etc.

The Commissioner reserved his ruling upon the appellant's motion to dismiss because of the insufficiency of the indictment to show probable cause, and proceeded to take the testimony of two witnesses on behalf of appellant, subject to objection and motion to strike on behalf of the Government on the ground that the testimony was not in rebuttal of probable cause but in defense of the "main action" (R. 20, 22, 36, 41, 43, 44).

These witnesses were Jasper Blackburn, President and General Manager of the Everstick Anchor Company, and Joseph A. Scott, Secretary and General Manager of Brown, Lynch & Scott Company.

The plant of the Everstick Anchor Company was located at St. Louis, Missouri. The witness, Blackburn, testified that during the three years next preceding the indictment it had bought its castings mainly from the appellant's company which was located at Fairfield, Iowa (R. 19); that there were two manufacturers of malleable castings located at St. Louis, the St. Louis Malleable Castings Company, and the National Malleable and Steel Castings Company (R. 19, 25) (both of which are named as defendants in the indictment, R. 9, 10); that these companies and, in addition, the Badger Malleable Iron Company of South Milwaukee, Wisconsin, the Danville Malleable Iron Company of Danville, Illinois, the Zanesville Malleable Iron Company of Zanesville, Ohio, and the Wisconsin Malleable Iron Company (all of which are defendants in the case) had solicited his business during the three-year period

(R. 20, 21, 25, 26, 27, 28, 30-31). The witness also testified that he thought the Illinois Malleable Iron Company of Chicago, and the Dayton Malleable Iron Company of Dayton, Ohio, also solicited him during this period but was not sure (R. 26, 27).

The prices submitted to the witness by some of these concerns were in some instances lower than the prices of the Iowa Malleable Iron Company (R. 24-25, 29, 34, 35); at one time the St. Louis Malleable Castings Company had made castings for his company, and on the greater part of the tonnage its prices were lower than the Iowa Malleable Iron Company's prices. The latter company's prices were f. o. b. Fairfield, and the former company's f. o. b. St. Louis (R. 36). Price was not the only consideration which governed witness in the purchase of castings. Confidence in the business methods of the Iowa Company was an element in the situation (R. 25). Witness never understood or had any reason to believe that there was any arrangement by which he was restricted to dealing with the Iowa Malleable Iron Company (R. 24, 29, 30). He kept in touch with the market and considered the prices charged by the Iowa Company fair and reasonable (R. 32-33).

The witness Scott was located at Monmouth, Illinois. The Brown, Lynch & Scott Company, of which he was general manager, made agricultural implements, and he had had during the three years next preceding the indictment the entire charge of the purchase of malleable castings used by it (R. 37). During this period he purchased all of his castings from the Iowa Malleable Iron Company (R. 37). He was urgently solicited by other concerns for his business at prices which were in some instances lower than those charged by the Iowa Company (R. 38, 39). Among

these concerns were the Peoria Malleable Iron Company, the Vermilion Malleable Iron Company and the Stowell Company (R. 38). The two companies last named are defendants to the indictment (R. 11). There was considerable expense involved in moving patterns from one foundry to another and the Iowa Company had given excellent service and excellent quality of material for a good many years, and the difference in price didn't justify taking the business away from it (R. 39). The witness considered the Iowa Company's prices fair and reasonable (R. 39-40).

After an adjournment the Commissioner filed a written opinion on the questions reserved as above stated. As to the indictment, he said that "while the indictment may not be drawn with that clearness as to specify the acts of individual defendants constituting the offense, as might be done by some in the drawing of indictments," still it charged an offense against the Government and justified the Commissioner "in finding the defendant to be a fugitive from justice" (R. 45). On the motion to strike, he held "that evidence offered on the part of the defendant which is strictly defensive in its nature is not admissible and the motion to strike such evidence as has already been heard of a defensive nature is sustained" (R. 46). That this ruling included the entire testimony of the witnesses Blackburn and Scott was subsequently made clear (R. 57-58).

The effect of this ruling was to confine the evidence in rebuttal to the testimony of appellant. He testified that he was Secretary and General Manager of the Iowa Malleable Iron Company, and during the three years next preceding the indictment was in general charge of the company's affairs and did most of the soliciting of business. About fifteen per cent of the business was agricultural im-

plement work, about thirty per cent street car and railroad car castings, and the balance miscellaneous. He was then asked to describe the process of manufacturing of castings and the question was objected to as immaterial and the objection sustained (R. 42-43).

The Iowa Malleable Iron Company joined the American Malleable Castings Association in 1914 or 1915; at this time the company was producing a very inferior product, and its object in joining the Association was to obtain the benefit of the research and laboratory work upon which the Association was then embarking (R. 50-51). The Association maintained a laboratory at Albany, New York, in charge of a chemist and consulting engineer, and this laboratory kept a continuous check upon the quality of iron produced by each foundry and issued certificates to members whose product met the Association requirements as to quality showing that they were producers of "certified malleable iron castings" (R. 51-52). At the time the Iowa Company joined the Association the standard of the American Society For Testing Materials was 35,000 pounds tensile strength, and a capacity of five per cent elongation in two inches. These specifications have been increased to 50,000 pounds and ten per cent (R. 51).

The Association also carried on exhaustive research work in regard to materials for melting and annealing furnaces, methods of constructing and operating them, and other manufacturing problems. The Iowa Company found that technical research was essential to the maintenance of the quality of its product, and its sole object in joining the Association was to get the benefit of this work (R. 52).

The research work was maintained by an assessment based on the tonnage produced by the member. During the

three years period before the indictment this assessment amounted to about $750 for the Iowa Company (R. 58). In addition each member paid dues at the rate of $120 a year, which went to the maintenance of an Association office at Cleveland. There were about sixty members in the Association (R. 69).

Appellant was never an officer of the Association. He attended its meetings when they were held in Chicago. Neither prices, terms and conditions of sale nor allocation of customers were discussed in the meetings, although the witness had conversed with individual members about market conditions (R. 53). The witness had never discussed with members the allocation of customers generally or the allotment of any particular customer (R. 52-53). Asked whether he had ever discussed the fixing of prices with any officer or member, he said he had not, except in 1918 at the instigation of the War Industries Board. This was objected to by the Government as being immaterial because it was six years before the return of the indictment, and the objection was sustained (R. 53).

The Iowa Company made it a practice to solicit trade by letters to possible purchasers. These letters were sent out without any consultation with the Association or any member as to the propriety of soliciting a given customer, and defendant was never requested by any member or by the Association not to solicit a consumer, nor did he ever ask any other manufacturer to refrain from soliciting one of his customers (R. 54). He was asked what he did when he received an inquiry from a consumer of malleable castings before quoting him, and the question was objected to as being evidence purely in defense and not in rebuttal of probable cause. The Commissioner ruled that the question re-

lated to "defensive matter" and sustained the objection (R. 54). Like rulings were made on a question as to whether appellant ever declined to quote upon inquiries from consumers and a question whether his company had supplied castings to the American Car Company (R. 55).

The witness was then permitted to and did categorically deny the charges as to agreements to eliminate competition, the fixing of prices and the allotting of customers contained in the fifth paragraph of the indictment (R. 55-56).

A list of the company's customers, identified as Exhibit D 7 was produced. This was originally objected to as not being the best evidence, and the objection was sustained (R. 47-48). The appellant then testified that he obtained the Alexander Manufacturing Company as a customer about 1915 or 1916. He was asked how he obtained its business and the Government objected on the ground that the question pertained to matter in defense.

In the colloquy which followed, counsel for appellant indicated that in order to prove that the customers were acquired and kept in the ordinary course of competitive trade, he proposed to interrogate appellant as to how he obtained the business of each customer and how he retained it or lost it as the case might be, and the Commissioner took the view that such evidence would be a matter for the jury and not for the Commissioner (R. 50).

Subsequently appellant testified generally that all of the customers upon the list were acquired in the ordinary course of competitive trade and that none of them was retained by means of any agreement with any other person, corporation or association; that appellant kept the trade of the company's customers by fair dealing, fair prices and the quality of its material and service, and that

customers who left the company did so by reason of competitive conditions, in which witness included prices, deliveries and quality (R. 56-57).

The question of the admissibility of the customer list recurring, upon an offer by appellant's counsel to make the list competent by the testimony of appellant, the Commission ruled that it should be excluded, not on the ground that it was incompetent, but because it was irrelevant, being "purely defensive matter" and not rebuttal on the question of probable cause (R. 57). He also said that the same ruling would apply to the testimony of buyers of malleable iron and a character similar to that of the witnesses Blackburn and Scott (R. 57-58).

On cross-examination appellant testified to the existence of an information service maintained by the Association through which members might obtain information as to prospective customers. Counsel for appellant pointed out to the Commissioner that he had endeavored to open this line of inquiry upon direct examination and had been prevented from doing so, and he thereupon resumed the direct examination (R. 62). The direct examination and the cross-examination upon this matter brought out the following facts. Malleable castings as a rule are manufactured from the customer's own patterns to suit his particular requirements, and in figuring on a casting from patterns with which the manufacturer is not familiar it is important to know the character of the casting and the character and condition of the pattern equipment. Information upon these points, and also as to the customer's credit and habits of dealing, could be obtained from a foundry which had manufactured that casting, and in some instances it was possible to ascertain the name of such a

foundry from the secretary of the Association (R. 62-64, 66, 70). The appellant's company filed with the secretary every six months a list of the customers it had been serving in the preceding six months' period (R. 66-67), and upon inquiring of the secretary as to a particular customer it could obtain from him the name of any other member who had listed that customer (R. 66). Having received that information appellant exercised his own judgment as to whether he would communicate with the member for the purpose of getting further information (R. 66-67).

In cases in which members had reported to the secretary the prices at which they had accepted orders from customers, other members could also obtain that information (R. 67). These reports related only to closed transactions (R. 67, 69, 70). The appellant did not know to what extent other members reported such closed transactions (R. 68). His company made such reports upon not to exceed 25 per cent of its business, and made inquiries of the secretary for information as to about ten per cent of the new trades (R. 65, 70). Neither the appellant nor the Iowa Company ever communicated with the Association as to any assignment of any customer to any manufacturer (R. 68-69). No customer was ever assigned to the company by the secretary, nor did the appellant ever hear of any such thing as the assignment of customers (R. 61).

Upon this record the Commissioner found the existence of probable cause for "holding the defendant as a member of this Association charged with restraint of trade under the Anti-Trust Act", and committed the appellant (R. 71-72).

The case came on for hearing before the District Court upon the marshal's return to the writ of habeas corpus,

alleging that he held the appellant under the Commissioner's order of commitment, and upon the transcript of the proceedings before the Commissioner; and on April 10, 1925, the District Judge handed down his opinion (R. 73-75). He refused to consider either the evidence introduced before the Commissioner or the rulings of the Commissioner excluding evidence, holding that under the decision of the Circuit Court of Appeals for the Eighth Circuit in *Looney* v. *Romero*, 2 Fed. (2nd) 22, the defendant was not entitled to controvert the truth of the allegations in the indictment, and therefore the only question before him was the question of the sufficiency of the indictment (R. 73-74). He also refused to determine this question for himself because, Judge Westenhaver having overruled demurrers filed by other defendants in the trial court, he felt that this decision was "by comity" binding upon him (R. 75). And he therefore entered the order, from which this appeal is prosecuted, discharging the writ of habeas corpus and remanding appellant to the custody of the marshal (R. 75).

Specification of Assigned Errors Intended to Be Urged.

The District Court erred:

1. In discharging the writ of habeas corpus.

2. In refusing to discharge the appellant.

3. In holding that the indictment introduced in evidence on behalf of the Government was sufficient evidence of probable cause to believe the appellant guilty of an offense against the United States.

4. In not holding that the detention of the appellant by the marshal under the order of the United States Commissioner, was in violation of the Sixth Amendment to the Constitution of the United States, for the reason that there was no competent evidence to sustain the finding of probable cause to believe that petitioner had committed any offense against the United States triable in the District Court for the Northern District of Ohio.

5. In holding that the ruling of the District Court for the Northern District of Ohio, that the indictment returned in said court was sufficient as a pleading, was binding on the court in the case at bar in determining a different issue, namely, the issue of the sufficiency of said indictment as evidence of probable cause, and compelled said last mentioned court to hold that said indictment in itself constituted probable cause for believing that petitioner had committed an offense against the United States triable in the Northern District of Ohio, and necessitated the removal of appellant, thus depriving appellant of his constitutional rights under Section 2, Article III of the Constitution of the United States, and the Sixth Amendment to said Constitution.

6. In not holding that the detention of the appellant by the United States marshal under the order of said Commissioner, committing petitioner to the custody of said marshal, was in violation of Section 2, Article III of the Constitution of the United States, and of the Sixth Amendment to said Constitution, for the reason that in said proceeding for removal said Commissioner refused to receive, excluded, struck out, and refused to consider, on the ground that it was defensive and not material, the testimony of the

witness Jasper Blackburn, shown on pages 19 to 36, inclusive, of the record, and the testimony of the witness Joseph A. Scott, shown on pages 37 to 41, inclusive, of the record, said witnesses and their said testimony having been tendered on behalf of appellant to show that they had been actively and vigorously solicited for their business by active and aggressive competitors, co-defendants of appellant; said testimony so excluded and each of said witnesses being competent and material to show and prove that there was no probable cause for believing that said appellant was guilty of the offense charged in said complaint for removal, or any offense against the United States within the Northern District of Ohio and triable in the District Court for said district; the motions to strike said testimony being shown on pages 36 to 41 of the record and the order of the Commissioner striking out said testimony and refusing to consider the same, to which order the appellant at the time duly excepted, being shown on page 46 of the transcript in the following language:

> "In the light of the foregoing, it is my opinion that evidence offered on the part of the defendant which is strictly defensive in its nature is not admissible, and the motion to strike such evidence as has already been heard of a defensive nature, made by counsel for the Government, is sustained."

7. In not holding that the detention of the appellant by said United States marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States, and of the Sixth Amendment to said Constitution, for the reason that in said proceeding for removal said Commissioner

refused to receive and consider the testimony covered by the offer made by the appellant shown on pages 49-50 of the record in the following language:

> "that during said period (meaning from January 1, 1917, to March 27, 1924) the said company has acquired all of its customers in the ordinary course of competitive trade, that such customers as it has retained during said period it has retained by means of fair prices and satisfactory service and not by any agreement or understanding with any person or corporation or association as to prices or terms or conditions of sale except the agreement between the particular customer and said company, and that such customers as it has lost have been lost in the ordinary course of competitive trade and have not been assigned or allotted by said company or by the defendant or by any other person, corporation or association."

to which objection was made by the United States and sustained by the Commissioner in the following language shown on page 55 of the transcript:

> "I think that all that evidence would be strictly defensive. The objection will be sustained to that."

to which ruling the appellant at the time duly excepted, and by which ruling the said Commissioner denied the appellant the right, to which he was entitled under the above mentioned provisions of the Constitution, to show that there was no probable cause for believing that he was guilty of the offense charged in said complaint for removal or of any offense against the United States within the Northern District of Ohio, triable in the District Court for said district.

8. In not holding that the detention of the appellant by the United States marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States and of the Sixth Amendment to said Constitution, for the reason that in said proceeding for removal said Commissioner refused to receive the testimony covered by the offer of the appellant shown on page 57 of the record in the following language:

> "Defendant offers Exhibit D-7, (As appears on page 48 of the record, this was a list of the customers of Iowa Malleable Iron Company, with which company appellant was affiliated) and D-8 in Evidence. * * * The defendant offers to show that the corporations or companies named in defendant's Exhibit D-8 were, under the first heading, obtained since 1918, and under,—that those under the second heading were lost since 1919."

to which objection was made by the United States and sustained by the Commissioner in the following language shown on page 57 of the transcript:

> "The Court: The objection will be sustained.
>
> Mr. Ross: Does the Court sustain it on the ground of incompetence?
>
> The Commissioner: Well, I don't see that it is material to the issue here, and it is irrelevant.
>
> Mr. Ross: Well, it probably isn't competent under our rule. We can supply the competency by Mr. Hughes' own personal knowledge, and I would like to have the record so show. Of course that memorandum there probably isn't competent now.

> The Commissioner: Well, I am satisfied so far as Mr. Hughes is concerned, of his personal knowledge, so far as that is concerned.
>
> Mr. Ross: But I would like to have the record show that it isn't sustained on the ground of incompetence.
>
> The Commissioner: Well, it is sustained on the ground that it is purely defensive matter and doesn't rebut the question of probable cause.
>
> All of which was duly excepted to."

which said offer of testimony was made by appellant for the purpose of showing that there was active competition for the customers of the company with which appellant was affiliated, many of which were acquired or lost during the period covered by the indictment, and that those so acquired or lost were in no way allotted or assigned, and as evidence showing that there was no probable cause for believing that appellant was guilty of the offense purported to be charged in said complaint for removal or of any offense against the United States within the Northern District of Ohio, triable in the District Court for said district.

9. In not holding that the detention of the appellant by said United States marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States, and of the Sixth Amendment to said Constitution, for the reason that in the proceeding for removal before said Commissioner, said Commissioner refused to receive the testimony covered by the offer of appellant shown on page 71 of the transcript as follows:

> "Now, if your Honor would be willing to follow this further and let us bring in customer witnesses, perhaps in the light of what you have learned about the business this afternoon you would be willing to reconsider that decision and allow us to follow the thing further."

and to which offer the Commissioner ruled as follows:

> "I don't see where that would be material. I think that would be purely defensive."

to which ruling the petitioner at the time duly excepted, said offer having been made for the purpose of showing by competent witnesses present at the hearing that there was active and aggressive competition for the customers of the company with which appellant was affiliated, carried on by appellant's codefendants during the three-year period immediately preceding the finding of the indictment, as competent, material evidence showing that there was no probable cause for believing that appellant was guilty of the offense purported to be charged in said complaint for removal or any offense against the United States within the Northern District of Ohio, triable in the District Court of said district.

10. In not holding that the detention of the appellant by said United States marshal under the order of said Commissioner, as aforesaid, was without due process of law and in violation of the Fifth Amendment to the Constitution of the United States, for the reason that the petitioner was denied full opportunity to be heard upon the issue of probable cause.

Summary of Argument.

The appellant's contention is that the District Court erred in holding that the indictment was conclusive of the Government's right to an order of removal and in wholly disregarding the evidence before the Commissioner showing a want of probable cause to believe appellant guilty of any offense.

The indictment made only a prima facie case of probable cause and the appellant had a constitutional right to rebut this case by evidence. It follows that if his evidence did fully meet the case made by the indictment, the Commissioner had no power or authority to commit him, and he was entitled under the Constitution to his discharge in *habeas corpus* proceedings.

The evidence in behalf of the appellant showed conclusively that the only combination to which appellant was a party was a trade association and that the practices of this association were lawful and proper under the recent decisions of this court, and it specifically met and overcame the charges of price fixing and allocation of customers contained in the indictment.

ARGUMENT.

I.

The District Court erred in its decision as to the nature and scope of the issue in removal proceedings, in holding that the indictment and proof of appellant's identity established the Government's right to an order of removal, and wholly disregarding the evidence showing want of probable cause introduced before the Commissioner, and in so doing the Court denied the appellant's constitutional right to a proper hearing on the issue of probable cause.

Upon this question the District Court expressed its view in the following language (R. 73-74):

> "When we compare and analyze all the authorities submitted in the very complete briefs of counsel, the only real question in this case is the sufficiency of the indictment.
>
> "If the indictment is sufficient and the identity of the defendant is admitted or proven, a complete case for removal is established.
>
> "Language is found in the cases which seem to indicate that the defendant is entitled to a hearing upon the merits of the question of guilt or innocence but this question was very definitely disposed of by the Circuit Court of Appeals in this Eighth Circuit in the recent case of *Looney* v. *Romero*, U. S. Marshal, 2 Fed. (2nd) 22, in which it is said:
>
> 'Position of the appellant at the hearing and his evidence was simply to the effect that he did not commit the crime; that of course is a matter to be tried out under the indictment.'
>
> "It is my duty to follow this last announcement of the Court of Appeals of this Circuit."

We submit that in taking this position, the District Court brought itself into irreconcilable conflict with the decision of this Court in *Tinsley* v. *Treat*, 205 U. S. 20.

In that case, as in this, the Government sought to remove a defendant for trial upon an indictment under the Sherman Act, and rested its case wholly upon the indictment. The defendant offered to prove that he was not guilty of the acts charged in the indictment, the court excluded the evidence, and an order of removal was entered. The accused then obtained a writ of habeas corpus and the writ was discharged by the District Court.

On appeal this Court reversed the judgment discharging the writ and remanded the case with a direction to discharge the accused. The Court held that under the Constitution a person could not be removed from one district to another for trial upon a criminal charge until there had been a judicial determination in the district in which he was found that there was probable cause to believe him guilty of an offense lawfully triable in the district to which it was sought to remove him; that an indictment returned in the latter district was *prima facie* evidence of probable cause, but only *prima facie* evidence, and that the accused was entitled, in the proceeding for his removal, to rebut the case made by the indictment by "evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that District." And the Court concluded its opinion with the following language:

> "Nor can the exclusion of the evidence offered be treated as a mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution."

And in *Harlan* v. *McGourin*, 218 U. S. 442, this Court said of the decision in *Tinsley* v. *Treat*,

> "It was held that while an indictment constitutes *prima facie* evidence of the offense, when the defendant offered to show that no offense had been committed triable in the district to which removal was sought, the exclusion of such evidence was not mere error, but a denial of a right secured under the Federal Constitution to be tried in the State and District where the alleged offense was committed and therefore reviewable under *habeas corpus* proceedings."

This rule has never been repudiated or modified by this Court, and it manifestly renders the position taken by the District Court that the indictment was conclusive of the right of the Government to an order of removal untenable.

II.

If the evidence on behalf of appellant demonstrated the lack of probable cause, the Commissioner had no power or authority to commit him, and he was entitled as a matter of constitutional right to his discharge in habeas corpus proceedings.

We fully appreciate that the writ of *habeas corpus* cannot be used to correct mere error on the part of an examining magistrate. But if, as this Court held in *Tinsley* v. *Treat*, the accused in a removal proceeding has a constitutional right to introduce evidence to rebut the *prima facie* case made by the indictment, it necessarily follows that when he has introduced evidence which fully meets that

case, and which is neither discredited nor contradicted by evidence on behalf of the Government, he has a constitutional right to be discharged.

To hold that evidence in rebuttal of the case made by the indictment may be arbitrarily disregarded, no matter how clear and convincing it may be, and that the accused person in such a case has no remedy by *habeas corpus* proceedings, would be to authorize the removing tribunal to treat the indictment as conclusive evidence of probable cause, and destroy the rule established by this Court in *Tinsley* v. *Treat*.

We therefore insist that the District Court was bound to consider the evidence introduced by appellant to rebut the charges made by the indictment, and if, as we contend and propose to show, that evidence established appellant's innocence of those charges, he was entitled to his discharge.

III.

The evidence on behalf of appellant fully met the case made by the indictment and demonstrated that there was no probable cause to believe him guilty of any violation of the Sherman Act.

The question which first presents itself in this connection is the character of the *prima facie* case with which the appellant was confronted. This question received no consideration in the District Court, which held that it was precluded from any discussion of the indictment by reason of the fact that the Court in which it was returned had held it sufficient as against a demurrer filed by defendants who were not contesting removal (R. 75).

Without pressing the question whether the attitude was justified in a proceeding which presented the issue whether the Court which had ruled on the demurrer had jurisdiction to decide anything with reference to the appellant, we submit that the appellant's evidence in rebuttal of the indictment cannot be dealt with properly until the case made by the indictment has been appraised. And we believe that no case more tenuous has ever been put forward by the Government as a basis for removal.

Apart from a formal charge that all the defendants named in the indictment have violated the Sherman Act which follows the language of the statute, and cannot possibly be held to state any specific offense which would justify a prosecution, the indictment merely states that the corporations named as defendants have carried on their interstate trade pursuant to an agreement to eliminate competition, have by agreement "from time to time" fixed excessive and non-competitive prices for malleable iron castings and quoted and sold castings at such prices, and have "assigned and allotted their customers to one another" and enforced such allotments by refraining from competing for such customers" (R. 14).

This court has held in *Weeds, Inc.*, v. *United States*, 255 U. S. 109, that the word "excessive" as applied to prices has no proper place in a penal proceeding, and it has also held in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, that the fixing of non-competitive prices does not necessarily constitute a violation of the Sherman Act.

As to the charge that the corporate defendants allotted and assigned customers to one another, it is to be observed that the indictment does not even allege that this was done by agreement and is apparently based on the view that

the Sherman Act imposes a duty to compete—a theory which this court has definitely repudiated.

Swift & Company v. *United States*, 196 U. S., 375, 400.
United States v. *Reading Company*, 226 U. S., 324, 326, 369-370.

The appellant and the other natural persons named in the indictment are not charged with having authorized or done any act claimed to be illegal but merely with having been officers or agents of the defendant corporations.

The only basis for the jurisdiction of the District Court for the Northern District of Ohio to which removal is sought, is the charge that the corporate defendants were members of an association with headquarters at Cleveland in that district, and while it is alleged that the association was an instrumentality of the supposed combination, there is no statement of what it did in pursuance thereof or indeed that it did anything.

This, we submit, is a slender thread with which to draw defendants from all parts of the country to a long and burdensome criminal trial at Cleveland, and in the case of this appellant we believe it has been definitely broken by the evidence introduced before the Commissioner.

The appellant was Secretary, Treasurer and General Manager of the Iowa Malleable Iron Company, and in general charge of its business during the greater part of the period covered by the indictment, and he had been connected with it for many years prior to that period (R. 42).

With reference to the charges made in the indictment he testified as follows (R. 55-56):

"Q. Mr. Hughes, during the period covered by the indictment, from January 1, 1917, to March 27, 1924, have you or the Iowa Malleable Iron Company ever entered into any understanding, agreement or combination with any person or corporation named in the indictment to eliminate competition as to prices, terms and conditions of sale, or as to customers?

A. No, sir.

Q. Have you or your Company carried on trade or business in malleable iron castings under or pursuant to any such agreement or understanding?

A. No, sir.

Q. Have you or your Company fixed or quoted excessive or non-competitive prices?

A. No, sir.

Q. Have you or your Company during said period engaged in any combination in restraint of interstate trade and commerce in malleable iron castings?

A. No, sir.

Q. Or fixed excessive and non-competitive prices for malleable iron castings or quoted prices or made sales of such castings at prices so fixed?

A. No, sir.

Q. Have you or your Company ever assigned or allotted customers to be held as the exclusive customers of any person or corporation?

Mr. Wilson: I object to that question for the reason it is in defense and not in rebuttal of probable cause and move that all previous testimony along this line that has been had since the recess be so stricken for this same reason, incompetent, irrelevant and immaterial.

The Commissioner: The evidence may stand as to his having any agreement or working under any agreement.

The question was read by the reporter.

A. No, sir.

Q. Or enforced such assignments by refraining, directly or indirectly, from competing for customers so assigned?

A. There are no assignments."

As to the question of prices appellant testified as follows (R. 47):

"Q. Mr. Hughes, how have you determined what prices to charge your customers?

Mr. Wilson: I object to that as calling for the conclusion of the witness.

The Commissioner: Overruled. He has testified that he is manager and secretary of the Iowa Malleable Iron Company. I suppose that is the company you refer to, how they fix their prices.

Mr. Price: Yes.

A. Our sale prices have been based upon our actual cost of accounting records and based according to our actual experience of the cost of producing our work, or if it is new work on the cost established on that work after the submission of proper information regarding the character of the work and the condition of the pattern equipment and tonnage involved, and then our prices are made or established on what we consider as our legitimate margin of profit, which is added to the either actual or market conditions, the cost affecting that particular work.

Q. Do you have written contracts with your customers?

A. The last written contracts that we had expired in 1919, or possibly the early part of 1920.

Q. And what is your practice now with regard to filling orders from your customers?

A. With very few exceptions every price or agreement that we have with a customer is subject to change at any time in accordance with the—any change in the actual or market cost conditions. There are some few customers who insist on quarterly definite statement of price.

Q. Has any individual or corporation or association ever suggested to you or your company that your price in a given instance should be raised?

A. No, sir, they have not.

Q. Have those persons referred to, persons and corporation, ever requested you in any way to refrain from lowering any price for malleable iron castings?

A. You mean any—any person or corporation?

Q. Yes.

A. No, sir.

Q. Or Association?

A. No, sir, I never had it suggested.

Q. Or any member of any association?

A. No, sir."

The appellant also testified as fully as the Commissioner would permit upon the question of the relations of the Iowa Malleable Iron Company with its customers. A list of the Company's customers were produced and counsel for appellant proposed to interrogate appellant as to the method by which the company obtained each one, and how it kept its business or lost it as the case might be (R. 48, 50). The Commissioner refused to permit this line of examination on the ground that it would be proper only upon the trial in the court where the indictment was found (R. 50, 56-57).

The appellant was, however, permitted to testify generally as to this list of customers as follows (R. 56-57):

"Q. With regard to the list of customers, defendant's Exhibit D-7, containing about 178 customers, will you state whether you acquired all of those customers in the ordinary course of competitive trade?

A. We did.

Mr. Wilson: The same objections as heretofore.

The Commissioner: Overruled.

Q. State whether or not as to such of those customers as your Company has retained during the period covered by the indictment, whether it has retained those customers by means of any agreement or understanding with any other person or corporation or association as to prices or terms or conditions of sale or allotment of customers.

A. No, sir, they have not been retained by any agreement, or in any way aside from the actual business transactions with those customers themselves.

Q. If you know how did you retain those customers during that period?

A. By reason of fair business dealing and fair prices and fair consideration, and the quality of the material and the personal service granted to those customers.

Q. What elements enter into the service rendered by a manufacturer of malleable iron castings?

Mr. Wilson: I object to that as immaterial.

The Commissioner: Sustained.

(Exception.)

Mr. Price: If your Honor please, we desire to show that the price of malleable iron castings is not alone important, but just as important as the matter of price is the matter of service, and par-

ticularly the quality of the castings; that it is not like a standard product, such as lumber, or steel rails, but each casting differs from every other casting.

The Commissioner: I think that would be immaterial under the charge in the indictment. Objection sustained.

(Exception.)

Q. Will you state whether any customers that you may have lost in the period covered by the indictment were assigned to any other manufacturer, allotted or assigned?

A. I never had any such knowledge.

Q. How do you account for their leaving you?

A. On account of directly competitive conditions.

Q. What enters into those competitive conditions?

A. The matter of price, the matter of delivery, the matter of quality possibly for a certain class of work."

As to the Iowa Company's methods of getting business, his testimony was the following (R. 53-54):

"Q. Have you sent out to consumers of malleable products any advertising letters or circular letters?

A. Nothing more than——

Q. Soliciting their trade?

A. Nothing except personal letters.

Q. State whether or not you have—that has been a practice of the Iowa Malleable Castings Company to solicit trade generally in that manner.

A. Yes, sir, we have.

Q. Have you done it during the three years ending March 27, 1924?

A. Yes, sir.

Q. Well, state how frequently you have sent out such letters.

Mr. Wilson: I object to that as immaterial and not rebuttal of probable cause.

The Court: Well, he may answer.

A. What was the question?

The question was read by the reporter.

A. That depends on business conditions. But we usually send out inquiries of that kind, soliciting work from the users of malleable when the business conditions are at a low ebb.

Q. Did you communicate with the Association or with any member of the Association before sending out such letters as to whether it was proper for you to send out letters to the given consumers?

A. No, sir. I consider it my right to solicit business where I please.

Q. Where did you get the list to which you addressed such letters?

A. From our records that we have kept up for a great many years as to the users of malleable.

Q. How many years?

A. Oh, ten or twelve years at least; twenty years possibly.

Q. Has any member of the Association or any individual representing a member of the Association or the Association ever requested you not to solicit the trade of a given consumer of malleable iron?

A. No, sir.

Q. Of malleable iron castings?

A. No, sir.

Q. Have you ever requested any individual or any corporation to refrain from soliciting one of your customers?

A. No, sir, I never did.

Q. When you received an inquiry from a consumer of malleable iron castings state just what you did before you quoted him, what information you generally obtained.

Mr. Wilson: I object to that question as—and all other questions along this line as being immaterial, irrelevant and incompetent, being evidence purely in defense and not in rebuttal of probable cause, and inadmissible for that reason and for each and all the reasons stated.

The Commissioner: I think that would be defensive matter. Objection sustained.

(Exception.)

Q. Mr. Hughes, have you at times declined to quote when you have received inquiries from customers—from customers of malleable iron castings?

Mr. Wilson: The same objections heretofore made.

The Commissioner: I don't see where that is material. Objection sustained.

(Exception.)

Q. State whether or not you have supplied castings to the American Car Company.

A. Yes, sir, we have.

Mr. Wilson: I object to that for the reasons heretofore made, immaterial, not in rebuttal of probable cause.

The Commissioner: I think all that evidence would be strictly defensive. The objection will be sustained to that.

(Exception.)"

Although the indictment did not charge that the Association was an illegal combination, or indeed relate the Association to the supposed combination at all except by alleging that the corporate defendants "required" it to collect and distribute certain information, without stating that it ever complied with this requirement, it became evi-

dent upon appellant's cross-examination that the Government's case rested in reality upon the participation of the appellant in the activities of the Association. The appellant's testimony upon this point is of vital significance, and we take the liberty therefore of giving it substantially in full (R. 50-53).

"Q. When did the Iowa Malleable Iron Company join the American Malleable Castings Association?

A. It was—either in 1914 or 15; I am not positive.

Q. Do you know at whose suggestion your Company joined that Association?

A. I made a suggestion to Mr. Spaulding, who was then Manager of the Company.

Q. And were you at that time an officer of the Company?

A. I was, yes.

Q. What was the object in joining this Association?

A. To get the benefit of the research and laboratory experience and the program of technical work that the Association were putting on then and contemplated carrying on to a greater degree in the future years. We were producing at that time a very inferior product.

Q. Is that true of the malleable iron industry generally or were you speaking of your own Company?

A. I was talking about our own concern.

Q. Well, do you know about the condition of the malleable iron castings produced by other companies as well as your own, speaking very generally?

A. Very generally only. I know that there was a great deal of diff ence in different companies as to the quality of the product; sometimes you would get good material and other times you would not.

Q. Were your Company and other malleable companies experiencing any competition from other castings—from manufacturers of other than malleable iron castings at that time?

A. Yes, sir. We have always experienced that competition.

Q. From what sort of manufacturers?

A. Well, manufacturers of gray iron, or semi-steel, or steel.

Q. And state what was done by the Association at that time along the line of this research work? State as briefly as possible.

A. I know at the time we joined the Association of the specifications for physical requirements of samples, as set down by the American Society for Testing Materials, and that was 35,000 pounds tensile strength per square inch with an elongation of five per cent in two inches. At the present time those specifications are 50,000 pounds tensile strength per square inch with a ten per cent elongation in two inches, which very nearly approaches certain classes of steel castings in strength.

Q. During that time did the Association maintain laboratories and its own chemist?

A. Yes, sir.

Q. Whereabouts?

A. At Albany, New York.

Q. And what was each member of the Association required to do or to send to that laboratory?

A. We were required to send to the consulting engineer of the Association some one test bar from some one heat each day, each working day; that is, a standard test bar of the American Society for Testing Materials.

Q. State whether or not your Company did that during the period from January 1, 1917, to March 27, 1924, the date of the indictment.

A. I don't remember exactly when they started that system of sending in bars, but we have ever since it has been in existence.

Q. Who is the chemist who has been employed by the American Malleable Castings Association?

A. Enrique Touceda.

Q. Spell it.

A. E-n-r-i-q-u-e T-o-u-c-e-d-a.

Q. State whether or not he and his assistants have any system for inspecting plants of members of the Association.

A. Yes, sir, they do.

Q. What system have they?

A. Well, they have these test bars and the requirements are that the—that at least ninety per cent of all your bars must stand up physically under the requirements of the Association each three months or you are not considered a producer of first class malleable iron; and, furthermore, there is an inspector at the present time, for instance, comes around at our plant every three weeks and inspects our product to see if the castings that we are producing conform with the quality of material and the physical requirements of the test bars that we submit to the Association engineer. He makes a report, a copy of which goes to the consulting engineer for —of the Association, and a copy of which I get, with such comments as he cares to make on his findings. And he also picks up at random any castings that he sees fit or any other test bars which are also tested for a check against our work.

Q. What is given to a member whose tests—whose test bars meet the tests of this Association, what certificate or——

A. A certificate as to quality, stating that they come within the requirements of the Association and are considered a producer of what they term certified malleable iron castings.

Q. What, if any, other activities, co-operative research activities, are carried on by the Association, in respect, for example, to shop practice, shop safety?

A. They carry on very exhaustive research work with reference to even molding sands and different classes of fire brick and packing materials, the construction of annealing ovens, the operation and construction of the melting furnaces. We so happen to have in our own plant, our own metallurgist is a member of the shop practice committee of the Association of fifteen that handle all these questions. He is on the committee of annealing.

Q. Have you a laboratory of your own at your plant?

A. Yes, sir.

Q. How long have you maintained that laboratory?

A. Since 1920.

Q. Did your experience with the research work of the Association have any bearing upon your starting your own laboratory?

A. Yes, sir, it did.

Q. What?

A. We found out we couldn't make the uniform product without more technical metallurgical and chemical knowledge as to the character of the materials and class of material that we wanted to turn out. We couldn't even keep up with the requirements of the Association without more technical knowledge. And we sent a man to school for nine months, at our own expense, to become a metallurgical engineer.

Q. Did you have any other object in joining the Malleable Castings Association, other than you have indicated just now?

A. That was our sole object, was to get the benefit of the co-operative research work.

Q. Have you ever been an officer of the American Malleable Castings Association?

A. No, sir, I have not.

Q. Or held any position with the Association?

A. Not other than a member.

Q. Have you attended meetings of the Association?

A. I attend the meetings in Chicago when they are held there quite regularly.

Q. Was the matter of prices, or terms, or conditions of sale, or allocation of customers ever discussed at any meeting of the Association which you attended?

A. No, sir, never was.

Q. Did you ever discuss such matters with members of the Association?

A. I might in a casual conversation regarding market conditions in different parts of the country.

Q. Did you ever discuss with members the allocation or assignment of customers generally, or any particular customer?

A. No, sir, I never did.

Q. Did you ever discuss with any officer of the Association or any member of the Association the matter of fixing prices?

A. No, sir, except at the instigation of the War Industries Board.

Q. Well, tell about that.

Mr. Wilson: What was that answer?

A. At the instigation of the War Industries Board, in 1918.

Mr. Wilson: I object to that, six years before the finding of this indictment, being immaterial to any issue here.

The Commissioner: Sustained.

(Exception.)

Q. When you attended these meetings of the Association state whether or not you made efforts to find out market conditions.

A. Regarding—regarding what, do you mean?

Q. Market conditions in your industry.

A. Yes.

Q. Did you do that aside from any conversations with members of the Association?

A. If I wanted any information regarding—probably concerning market conditions as to various classes of castings, any casual conversation of that kind would be held as an individual.

Q. But you stated that you attended these meetings in Chicago as I understand it.

A. Yes, sir."

It also appeared that the Association maintained an information service through which members could obtain certain information as to purchasers of malleable iron. The appellant's company filed with the Secretary of the Association twice a year a list of the customers it had served during the preceding six months, and upon inquiry of the Secretary as to any particular purchaser it could ascertain what other member, if any, had included his name in a similar list. To some extent members also reported to the Association the orders they had taken and the prices at which they had taken them and this information was available to members who made inquiries (R. 67-68).

As to this information service, appellant testified (R. 62-71):

"Q. What information did you endeavor to obtain before you made any work for a consumer of malleable iron castings?

Mr. Wilson: I want that connected with this Association. You say what information. Now you mean from the Association?

Mr. Price: I will come to that, but I think this is a proper question at this time.

Mr. Wilson: I object to this question as immaterial under the issues.

The Commissioner: Overruled at this time.

A. Every casting has its own conditions and its own cost. It is utterly impossible to quote on any man's work, I don't care what he makes, unless you have absolute and accurate knowledge as to the different needs—the different things relating to that work. You must know conditions, as to his pattern equipment and the condition of it and the character of his castings.

Q. All patterns are not the same then?

A. No, indeed.

Q. Is there such a thing as a standard casting?

A. Yes, there is in certain classes of work. Railroad work, for instance, has certain standard parts.

Q. What work?

A. Railroad work.

Q. Do you do much railroad work?

A. Oh, very little.

Q. Well, in castings which you manufacture you may state whether or not there is a variety of those castings or whether they differ each from the other.

A. Each and every casting has its own cost.

Q. Well, do the patterns which you receive from the consumers differ as to quality of the patterns, some being in good condition and some in bad?

A. Yes.

Q. And are some of the castings which you manufacture intricate castings, of intricate design and difficult to manufacture?

A. Yes, they are.

Q. What information along that line is it necessary for a manufacturer of castings to know before he undertakes to turn out castings for a customer?

A. It is necessary to know the condition of the pattern equipment, as I said a while ago, and the general character of that casting, in order to form your cost. One casting weighing one pound might cost one figure, and another casting weighing one pound might cost ten times as much, depending on the character of that casting and the condition of the pattern equipment from which it is to be made.

Q. Did you endeavor to find out whether castings for which you received an order had been difficult for some other producer of malleable castings to manufacture?

A. Yes.

Q. And how would you find out? How would you obtain such information?

A. We might get that information from the former producer and also if it was work of a class that we were not equipped to handle. Another reason to follow up an inquiry, it has never been our policy to take work that we didn't figure we could carry on for one particular customer as a steady customer.

Q. And could you obtain information along that line by communicating with the Association and finding out the former source of supply of a given consumer?

A. Yes, you could. You could get some information along that line. We did that in very, very few instances.

Q. Well, tell just what you did in those few instances where you did get information from the Association. What did you do in the way of following that up?

A. If the work was of a character that we could handle it and it was in our line, with the pattern

equipment proper, we considered it our perfect right to quote; we didn't care where that customer was located. If they were a concern that were using castings that were not in our line, or automobile work, for instance—we don't get in any automobile work except accessory work; never get in any of it; not equipped to handle it—or if they were customers so situated geographically as you might get a spasmodic order from at one time and never get them again, you can't make anything that way, from customers of that kind; you can't make money on a single order of a concern, so much preliminary cost to getting ready to produce a firm's work.

Q. State whether or not some producers of malleable iron castings specialize in light castings and others in heavy castings.

Mr. Wilson: I object to that as immaterial, incompetent and irrelevant.

——And in which of those categories your Company is.

Mr. Wilson: The same objection.

The Commissioner: Overruled.

(Exception.)

A. There is a very decided difference in the character of work required by users of malleable castings. We make—specialize on light work.

Q. Your Company?

A. Yes.

Q. If you found out that a consumer who had sent you an inquiry had just been receiving its castings from a manufacturer of castings whom you knew supplied only heavy castings would that have any bearing upon whether or not you went after that trade?

Mr. Wilson: I object to that as very leading and suggestive.

The Commissioner: Sustained.

(Exception.)

Q. Can you give some illustrative example, if any occurs to you, how by finding out the manufacturer of malleable castings who had immediately previous to the receipt of your inquiry been supplying the concern determined whether you would solicit that business?

A. I don't recall any. There are very few inquiries that we have made of that character.

Q. And state whether or not in the majority of instances you made inquiry of the American Malleable Castings Association regarding the respective consumer.

A. No, we don't in the majority of cases; not near.

Q. Well, can you approximate the percentage of cases in which you did make such inquiry of the Association?

A. I couldn't answer that in any degree of accuracy, but I wouldn't consider it over ten per cent.

Mr. Price: You may cross examine.

By Mr. Wilson:

Q. Now in regard to the money you sent this Association, was it 25c a ton that you testified to here as sending them—is that all the money that you ever sent them?

A. No, sir.

Q. What other money did you send them?

A. We sent our annual dues of $120.00 a year.

Q. $120.00 a year. Now the annual dues and this 25c a ton, did that constitute all the money you sent?

A. As far as I know, unless they were undertaking some special technical work that required extra funds to carry that work on.

Q. Did you pay anything extra for this information service?

A. No, sir.

Q. Would that come in the $120.00 a year annual dues?

A. I don't know where it came in. I didn't handle the benefits of the Association.

Q. Did you have any by-laws or anything like that in this Association?

A. Yes, sir.

Q. Was it incorporated, or just an association unincorporated?

A. I couldn't say.

Q. Did you ever read their by-laws?

A. I don't believe I ever did.

Q. Does your Company have a copy of them?

A. I do not know whether they do or not.

Q. Who receives the mail for your Company?

A. Two or three different employes.

Q. Who receives the telegrams and things of that kind?

A. The telephone operator.

Q. You don't want to testify here that you examine all the mail that comes to this Company, do you?

A. No, sir, I do not.

Q. Or all the telegrams or all the telephone calls?

A. Not all of them, no.

Q. And if there were letters that came to your Company quoting prices that you should submit, or territory which might be allocated, or customers which might be given to you—such a letter might come to your Company and you never see it, mightn't it?

A. If any such letter ever come to my Company I would know it.

Q. What do you base that on?

A. My instructions to our office employes.

Q. To bring such a letter immediately to you?

A. Well, such letters that relate to customers or inquiries on prices to quote customers.

Q. You say you don't know anything about this information bureau that is maintained there, what its purpose was?

A. It is to get the—such information as they get in assisting the—the handling of business transactions legitimately.

Q. Well now just what was your understanding of the information they were to furnish you?

A. Information regarding the character of the concern's work, the condition of——

Q. You mean a prospective customer?

A. A prospective customer, yes, sir.

Q. The kind of castings they required?

A. The kind of castings they required.

Q. Is that all the information that you understood they were to send you?

A. And the condition of their—well, they don't know the character of castings, the Association don't.

Q. Well, I don't understand what information you thought you were to get from this bureau.

A. All the information we ever got was as to who produced that work, or who had produced it.

Q. What work do you mean, Mr. Hughes?

A. The work of any particular concern—who were producing the work of any particular concern.

Q. I am pretty dense, I guess, for I don't understand what you mean.

Mr. Price: State how, after you got the information from the bureau as to the former source of supply, you would obtain information; would you obtain—go back to the Association and ask them for the information you wanted?

A. No. If we got an inquiry from a concern and I wanted some more information regarding that concern, or the work of that concern——

Mr. Wilson: That is, the kind of material or product they turned out?

A. Yes. And I could ask the Association for who was making that work, or who had listed them as a customer. I could use my own judgment, if I wanted to go any further, and ask the concern who had been making it, for further information if I so desired. But I considered it my perfect right and privilege to quote it direct without getting any more information if I could get that information.

Q. Now what other information did you receive from this Company besides that?

A. I received the information as to prices of business closed.

Q. What is that?

A. The prices of the business that was closed.

Q. What do you mean by that?

A. The price of any contract that might be let that was already let.

Q. That is, what some other company had agreed to furnish——

A. No, sir, not what they had agreed to; what they had already entered into contract to furnish.

Q. Entered into contract to furnish. You got that information?

A. You could if you so desired.

Q. What did you use that information for?

A. That would be in response to an inquiry. You could use that information if you lost a customer.

Q. Well, how did you use it?

A. Give you the information how much the other fellow beat your price if he got the business.

Q. And the next time why you could——

A. I could beat his.

Q. You could beat his the next time.

A. If I could do it consistently and according to good business judgment.

Q. And that was the reason, the sole reason, for sending in those closed contracts was it, to this Association?

A. So far as I know.

Q. Did your Company send in closed contracts of that kind so another firm could beat you if he could beat you the next time?

A. We send in closed contract prices, yes, sir.

Q. And you were willing to do that, knowing that somebody else was going to use that to beat your price?

A. Not necessarily knowing that. That would be up to them.

Q. You sent it in there for that sole purpose?

A. No, not for that sole purpose.

Q. What other purpose?

A. Covering business closed.

Q. Well, why would the Association care about your business closed?

A. That would give some information as to the general trend, possibly, of prices, general market conditions.

Q. That was the sole reason you sent it in, was to let them know what you were furnishing stuff for?

A. So far as I know, yes, sir.

Q. That wasn't your idea at all was it Mr. Hughes? Wasn't it sent in there for the reason to show that the various members of this Association were living up to their agreements?

A. No, sir, it was not.

Q. Now you had listed with this Association all the customers you furnished; didn't you?

A. No.

Q. You didn't list them that way?

A. Listed them covering a certain period.

Q. Well now supposing your fiscal year—did you list all the customers you furnished for that year?

A. We listed in September all the concerns for whom we had made castings the previous six months.

Q. That was with the Association; you sent in the list?

A. Yes.

Q. And what was the idea of sending in that list?

A. To give other concerns the benefit of inquiry if they cared to make inquiry regarding the character of that concern's work or any one of those concerns' work.

Q. So they could write to you and find out what you were making for them?

A. No, sir. So they could get information regarding pattern equipment and the character of the work.

Q. And how much you were furnishing them for?

A. No, sir.

Q. Nobody ever wrote you and asked you how much you were furnishing a certain contract for?

A. Not except—unless the contract had been closed, and wanted to know if we got the business.

Q. They wouldn't need to write you direct for that would they? They could get it from the Association?

A. They could get it from the Association.

Q. And every member of this Association had every closed contract that they made in a certain period in that Association?

A. I don't know about anybody else. We didn't have half of ours in there.

Q. Just on your allocated territory, that is where you had——

A. Didn't have any allocated territory.

Q. How much did you pay Belt, do you know?

A. I don't know.

Q. What was the reason the metallurgical bureau was located at Albany, New York, and your information bureau at Cleveland, Ohio?

A. That is something beyond my knowledge, except that this man, Touceda, was hired and that is where he conducts his laboratory.

Q. But your information bureau was at Cleveland, Ohio, wasn't it?

A. Yes, sir.

Q. Did you ever communicate with the Association at Cleveland, Ohio, as to whom a certain customer had been assigned?

A. No, sir.

Q. Did your Company ever communicate with that Association, at Cleveland, Ohio, as to whom a certain customer had been assigned?

A. No, sir.

Q. Nobody in your Company or nobody that ever had any connection with your Company ever communicated along that line?

A. Not to my knowledge.

Q. Well, if they did would you have knowledge of it?

A. They wouldn't under my instructions.

Q. Well, if they did would you have knowledge of it?

A. I might not if some inferior officer would happen to write something.

Q. What I want to get at is this, suppose the Government now, Mr. Hughes, has in its possession a communication from your Company to this Association asking about certain customers and who they were assigned to; if the Government has such a communication as that would you know whether it had been sent or not?

A. I probably would.

Q. And now I want to ask you whether or not such a communication was ever sent by your Company?

A. No communication asking regarding the assignment of a customer. We might have asked who made the work of a particalar customer.

Q. But not anything about any assignment?

A. No, sir.

Q. Of prices, about prices of various articles?

A. Might have asked prices of business closed.

Q. Do you know how many members there are in this Association?

A. There are about sixty.

Q. Do you know the dues required from those various members?

A. The dues are $120.00 a year.

Q. Do all of those sixty members pay that?

A. I don't know.

Q. Did all of those sixty members pay 25¢ a ton on their tonnage?

A. I don't know.

Q. Do you know that only 47 of those 60 subscribed for this information service?

A. I don't know.

Q. You don't know that only a part of these members, who are members of this Association, malleable iron association, did not subscribe to this information bureau located at Cleveland, Ohio, do you?

A. I don't know what you mean by subscribed.

Q. Well, received the service.

A. No, I don't know a thing about anybody else's business.

Q. Were you ever an officer of this Association?

A. No, sir.

Q. Where did you send this $120.00 a year and $750.00?

A. To Cleveland.

Q. To Cleveland? And that $120.00 a year was for the service you received from Cleveland wasn't it?

A. For the service we received from Cleveland? That was for the clerical help and the executive work of the Association in the office there at Cleveland.

Q. You don't know whether these thirteen or fourteen members that didn't belong to that service of the Association sent that $120.00 in or not do you?

A. It is my understanding that everybody paid their dues.

Mr. Wilson: I believe that is all.

Examination. By the Commissioner:

Q. Mr. Hughes, there is just one question I would like to ask you. If you had some customer in mind, and say you wrote down to this Association, they would give you information as to the class of castings they were using and the pattern equipment?

A. No, no. They would give me the name of the concern, if any such concern listed that concern as a customer, so the information would be available if I cared to follow the inquiry further.

Q. That is, you would have to get the condition of their pattern equipment from the concern who had been making their castings? Is that it?

A. Yes, sir.

Re-direct examination by Mr. Price:

Q. It isn't only the condition of the pattern equipment, but the nature of the casting?

A. That is absolutely necessary. You can't cope with it without knowing the nature of the casting.

Q. Did the financial standing of the prospective customer have anything to do with it?

Q. Yes, the responsibility of the concern is the general inquiry you always make in any inquiry.

Q. Did you make inquiry as to the financial standing of these ten per cent—in the cases in which you made inquiry of the Association and got back word saying that such and such a manufacturer had been supplying, did you ask that manufacturer in many instances about the financial standing?

A. Yes, I did, if I did not already have that information.

Q. And their desirability as a customer, whether they were contentious or otherwise?

A. Yes, sir, that would have its bearing.

Q. Now, Mr. Hughes, in about what percentage of this business closed did you send in reports to the Association?

A. You mean in relation to the number of customers or tonnage or what?

Q. Yes, number of customers. What percentage of them did you send in reports to the Association of business closed?

A. I will have to guess at that somewhat, but it would not exceed twenty-five per cent.

Q. And your inquiries which you made of the Association were in only about ten per cent of the cases?

A. Yes, sir.

Q. Now this money that you sent to the Association, whatever it is, in the neighborhood of 25¢ a ton, was that to be used in defraying the expenses of the research work carried on by the Association?

A. Yes. That went to the jurisdiction of the research committee for advertising and conducting of the laboratory and for salaries of the metallurgical engineers and inspectors.

Q. Did you ever get from the Association any results of that research work?

A. Yes, sir.

Q. And state whether or not that was useful in your business and in enabling you to turn out satisfactory work for your customers?

A. It was very useful; technical papers covering different aspects in relation to the production of malleable iron castings and the preparation of the material, the matter of combustion, fuel oil, coke and coal, matters of annealing, the handling of annealing, annealing construction.

Q. Were those matters discussed at the meetings of the Association which you attended?

A. Yes, sir, very much in detail."

This is the appellant's evidence and we submit that in the absence of impeachment or contradiction, it effectively disposes of the vague and equivocal charges of unlawful agreements contained in the indictment. There is no ground for discrediting it. It was not a mere denial of guilt but affirmative testimony to facts inconsistent with the existence of guilt. In so far as it lacks circumstance and detail, the responsibility lies with the Government and the Commissioner and not with the appellant, who subjected himself to cross-examination and who was prevented from submitting to the Commissioner a complete and detailed history of the relations between his company and its customers only by the Government's objection and the Commissioner's ruling. In these circumstances, it is not for the Government to claim that the appellant's testimony that he had no part in any assignment of customers, or fixing of prices is not to be believed.

Nor is his testimony without corroboration. The fact that two customers of the Iowa Malleable Iron Company were produced and testified (R. 19-40) to urgent solicitation

for their business by defendants named in this indictment cannot be disregarded, even though that testimony was stricken out upon the Government's motion. This court has held in *United States* v. *United States Steel Corporation*, 251 U. S. 417, that customer witnesses who testified for a defendant in a case under the Sherman Act, must be assumed to represent the situation of customers generally unless the Government produces controverting evidence (251 U. S. 417, 448). And in this case the Government not only failed to produce evidence that any purchaser had been limited in his freedom to buy malleable castings where he saw fit to buy them, but it prevented the appellant from introducing evidence that purchasers did not find themselves so limited.

Indeed, both the Government and the Commissioner appear to have submitted to the view that the charges in the indictment that prices were fixed by agreement, and customers were actually allotted and assigned could not be supported, and to have taken the position that the case against the appellant rested upon his testimony as to the information service of the Association.

The Commissioner based his finding that there was an agreement in restraint of trade not upon the indictment but upon the indictment and the evidence of the appellant (R. 71), and there was no evidence of the appellant remotely tending to establish any agreement except an agreement to exchange information.

It is significant that this case was heard by the Commissioner and decided by the District Court before the decisions by this court in *Maple Flooring Manufacturer's Association* v. *United States*, 268 U. S. 563, and *Cement Protective*

Manufacturer's Association v. *United States,* 268 U. S. 588, were handed down, and while it was still the theory of the Department of Justice that the organized exchange of trade information among competitors might be held illegal, even though it was not charged or proved that such information was exchanged in furtherance of any concerted purpose "to restrain the freedom of action of those who buy and sell."

Upon that theory the Government and the Commissioner might have been justified in thinking that a violation of the Sherman Act had been shown by appellant's testimony that he participated in an information service which *might* have been used either for the allotment of customers or in furtherance of a policy of price-fixing, in spite of his denials that it was so used, and without any evidence to controvert those denials. But there is no longer any color for the view that business men may be indicted for participating in the systematic collection and distribution of information pertinent to their affairs, and legitimately useful, merely because it may be susceptible of improper uses, and we submit that an order of removal which is predicated on that view cannot be sustained.

There is certainly no other basis for the removal of appellant. It stands out clearly upon this record that the Government abandoned the charge of price-fixing and the allotment of customers made in the indictment. It could do nothing else in the face of appellant's uncontradicted and unimpeached testimony. There remains nothing except the fact that appellant's company was a member of a trade association which maintained a bureau of information and there is not a shred of evidence that appellant or

any one else ever made use of this bureau for any improper or unlawful purpose. We insist that upon such evidence the Commissioner had no power or authority to hold the appellant, that the District Court erred in refusing to discharge him from custody, and that the order appealed from should be reversed.

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